

Mirra v New York City Police Dept. - License Div.

2022 NY Slip Op 30762(U)

April 1, 2022

Supreme Court, New York County

Docket Number: Index No. 451863/2019

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD PART 35

Justice

-----X

SALVATORE MIRRA

Plaintiff,

- v -

NEW YORK CITY POLICE DEPT. - LICENSE DIVISION,

Defendant.

-----X

INDEX NO. 451863/2019

MOTION DATE 12/06/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 73, 74, 75, 76, 77, 78

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Salvatore S. Mirra (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross motion pursuant to CPLR 3211 (a) (5), of the respondent New York City Police Department License Division (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDRED that counsel for respondent shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

In this Article 78 proceeding, petitioner Salvatore S. Mirra (Mirra) seeks an order to vacate a determination of the license division (LD) of the respondent New York City Police Department (NYPD) as arbitrary and capricious, and the LD cross-moves to dismiss his petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted, and this proceeding is dismissed.

FACTS

In 1976, the NYPD's LD granted Mirra's application for a "Business Carry Handgun License," and thereafter also granted his triennial license renewal applications until 2017. *See* verified petition, exhibit A (Mirra aff). *Id.*, ¶ 20. On November 1, 2018, the LD sent Mirra a "Notice of Cancellation" which stated as follows:

"Dear Mr. Mirra:

"Your Business Carry Handgun License has been CANCELLED for the following reasons:

"As indicated in your Letter of Necessity and on your renewal application, which you submitted for your Business Carry license, you indicated that you are the owner of Arrim Management Consultant and your business is located at 9511 Church Avenue, Brooklyn, New York 11212. The business documents you provided, including your company taxes, indicate that your primary business address is located at 14 Coachmans Court, Old Westbury, New York. Since your principal place of your business is in Long Island, your need to carry in NYC no longer exist[s]. Please note that Title 38 Rules of the City of New York (RCNY), Section 5-02 (g), states that New York City licensees must either reside or maintain a principal place of business within the confines of New York City. Therefore, since your business/practice is no longer in New York City, your license is cancelled.

"You must immediately voucher the firearm that is listed on your license for safekeeping at your local police precinct, and provide Associate Investigator Gilliam with a copy of the voucher. Also, you must immediately mail your license to Associate Investigator Gilliam, License Division, One Police Plaza, Room 1 10A, New York, New York 10038."

Id., exhibit J. Mirra avers that he had his attorney send letters to the LD's Appeals Unit on April 19, 2019, May 22, 2019 and June 17, 2019, requesting a hearing to challenge the cancellation of his license. *Id.*, ¶¶ 24-25; exhibits K, L. He also avers that the LD never responded to any of his attorney's communications. *Id.*, ¶ 25.

Mirra originally commenced this Article 78 proceeding on July 1, 2019 in Kings County Supreme Court. *See* verified petition. Because that was the improper venue, given that the LD's offices are located in New York County, it was necessary to have this matter transferred to this court and re-noticed. That process took some time to complete both because of irregularities in Mirra's papers and because court operations were severely curtailed at that time as a result of the Covid-19 national pandemic. The LD filed its cross motion to dismiss the petition on December 28, 2021. *See* notice of cross motion. This matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

Article 78 proceedings are governed by a four-month statute of limitations which begins to run "after the determination to be reviewed becomes final and binding upon the petitioner . . . or after the respondent [agency's] refusal, upon the demand of the petitioner . . . to perform its duty." CPLR 217 (1); *see also Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 (2005). Here, the LD issued the subject Notice of Cancellation on November 1, 2018, and Mirra did not commence this proceeding until eight months later on July 1, 2019. As a result, Mirra's petition is clearly untimely.

Mirra nevertheless argues that the Notice of Termination was not a "final and binding" agency determination, and that he had an available administrative remedy to challenge it in the "Appeal of Application Disapproval" process that is set forth in 38 RCNY § 5-07 (e). *See* petitioner's mem of law in opposition at 6-8. Mirra asserts that he was required to exhaust this administrative remedy in order to obtain a "final and binding" LD determination which he could then challenge in an Article 78 proceeding. *Id.*, at 8-15. The LD responds that that administrative appeal process is only available to challenge Notices of Disapproval of handgun

license applications, and that it is not applicable to Notices of Termination, which are governed by 38 RCNY § 5-27 and not subject to administrative appeal. *See* respondent's reply mem at 3-5. The LD is correct. In *Valles v The New York City Police Dept. - License Div.* (2021 WL 1247892 [Sup Ct, NY County 2021], Index No. 155031/20), a case with nearly identical facts to this one, the court (Engoron, J.) made the following findings:

“Here, the notice of cancellation became final on November 2, 2017 as neither the applicable provisions of law, nor the notice itself, set forth any administrative steps by which the cancellation could be prevented or significantly ameliorated. In fact, respondent's January 3, 2020 letter states ‘[i]f your requests were intended as an appeal of the “Notice of Cancellation”, it should be noted that neither Title 38 of the Rules of the City of New York, nor any other applicable laws, statutes, or regulations provide for an appeal of a firearm license cancellation.’ Therefore, the instant proceeding is untimely, as four months from November 2, 2017 is March 2, 2018, which is over two years before the instant proceeding was commenced, and well before the 2020 Executive Orders tolling Statutes of Limitations.

“The fact that respondent answered petitioner's April 19, 2019 and May 22, 2019 requests for an administrative appeal have no bearing on whether this proceeding is time barred. *See Mendez v N.Y. City Dept. of Educ.*, 128 AD3d 584, 584 (1st Dept. 2015) (‘Petitioner's letters to [agency] after [date of final determination] did not extend statute of limitations’); *see also Tornheim v Fiala*, 136 AD3d 797 (2nd Dept. 2016) (finding that correspondence from petitioner after date of final determination and a responsive letter from agency did not undermine the finality of the final determination or serve to extend or revise the Statute of Limitations period). As such, the instant proceeding must be dismissed, as it is untimely.”

2021 WL 1247892, *1-2. Here, too, Mirra commenced his Article 78 proceeding four months after the statute of limitations had expired on March 31, 2019, and nine months before then-Governor Cuomo's Executive Order tolling the limitations period was issued in March 2020. 38 RCNY § 5-27 does not provide for an administrative appeal of Notices of Cancellation, and Mirra's attorney's correspondence with the LD did not toll the limitations period which began to run when the Notice was issued on November 1, 2018. Therefore, the court rejects Mirra's arguments.

Accordingly, the court concludes that Mirra's Article 78 petition is untimely because he filed it after the applicable four-month statute of limitations period had expired. CPLR 217 (1).

Consequently, the court grants the LD's cross motion to dismiss the petition on timeliness grounds. CPLR 3211 (a) (5).

DECISION

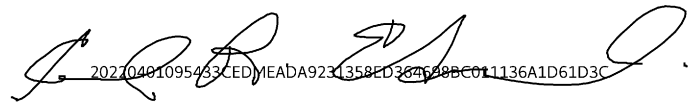
ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Salvatore S. Mirra (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross motion pursuant to CPLR 3211 (a) (5), of the respondent New York City Police Department License Division (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

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4/1/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE